ONG LIAN CHEE A

v.

LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA

HIGH COURT MALAYA, KUALA LUMPUR B
NOOR AZIAN SHAARI JC
[CIVIL SUIT NO: S7-21-258-05]
25 SEPTEMBER 2006

EMPLOYEES PROVIDENT FUND: *Withdrawal - Withdrawal of contributions - Akta Kumpulan Wang Simpanan Pekerja 1991, s.54(1) - Right to withdraw - Whether accrued on death of member - Date of death - Whether a determining factor - Payment of additional amount - Whether plaintiff entitled to RM30,000 as additional amount payable under s. 58(1) Akta Kumpulan Wang Simpanan Pekerja 1991 - Whether amended fifth schedule applicable to plaintiff - Whether interpretation adopted by defendant would cause injustice and inequality before the law* C D

The deceased was a member of the KWSP. Letters of administration to the estate of the deceased was granted to his wife, the plaintiff herein. The plaintiff applied for the withdrawal of all sums of money standing to the credit of the deceased with the KWSP under s. 54(1) of the Akta Kumpulan Wang Simpanan Pekerja 1991 (Act 452) in August 2001. Upon the withdrawal, an additional amount of RM2,000 was paid to the plaintiff pursuant to s. 58(1) of Act 452 read together with the Fifth Schedule to the same Act. The plaintiff contended that she was entitled to RM30,000 as additional amount payable under s. 58(1) of Act 452 and not RM2,000. It was argued since the deceased died on 12 October 1998, the provision of the fifth schedule of Act 452 then should apply irrespective of the fact that the withdrawal was made in August 2001. The defendant, on the other hand, argued that since the application to withdraw the credit standing to the member's account was made in August 2001, then the fifth schedule to Act 452 that was in force at the date/time of the withdrawal of all sums of money standing to the credit of the deceased member's account was made must apply even though the date of death was prior to the amendment that came into force on 1 July 2000, and as such only RM2,000 and not RM30,000 E F G H I

should be paid as additional amount under s. 58(1) of Act 452. After hearing submissions of both counsels, the court allowed plaintiff's claim. The defendant appealed against the said decision.

Held (allowing plaintiff's claim with cost):

(1) The right to withdraw under s. 54(1) of Act 452 accrued on the death of a member. Once such right accrued, s. 58(1) of the Act 452 comes into operation. As such, the determining factor was the death and therefore the date of death was the pertinent point. Since at the date of death the Fifth Schedule to Act 452 provides for a sum of RM30,000 that amount must be paid to the plaintiff. (para 16)

(2) The amended Fifth Schedule to Act 452 should not apply to the plaintiff as that would amount to giving the amendment a retrospective effect. This could not be done as firstly there was no provision providing for a retrospective effect of the amendment reducing the additional amount from RM30,000 to RM2,000. Secondly, it was trite that an amendment to any statute dealing with rights making it less favourable should not 'be construed retrospectively.' As such, since there was no provision to give retrospective effect to the amended Fifth Schedule to Act 452 that came into force on 1 July 2000, rights that have accrued should not be effected. (para 17)

(3) The defendant's arguments had no merit at all and could not be accepted. The interpretation adopted by the defendant would cause injustice and inequality before the law and surely this could not have been the intention of the legislature. (para 20)

Case(s) referred to:

Bank of Canton Ltd v. Dart Sum Timber (Pte) Ltd [1981] 2 MLJ 58 ***(refd)***

Lee Chow Meng v. PP [1978] 2 MLJ ***(refd)***

Mohamad Khalid Farzalur Rahaman & Anor v. Citibank Bhd & Anor [2000] 2 CLJ 797 HC ***(refd)***

Pesurohjaya Ibu Kota Kuala Lumpur v. Public Trustee & Ors [1971] 2 MLJ 30 ***(refd)***

United Asian Bank Bhd v. The Negeri Sembilan Development Corporation [1989] 1 MLJ 230 ***(refd)***

Legislation referred to:
Employees Provident Fund Act 1991, ss. 54(1), 58(1)

For the plaintiff - Anthony Gomez; M/s Gomez & Assoc
For the defendant - Sharifah Fadzliah Syed Taha

Reported by Suhainah Wahiduddin

JUDGMENT

Noor Azian Shaari JC:

[1] The plaintiff, Ong Lian Chee (Suing as Administrator of the Estate of Goh Tin Poh (deceased)) filed the originating summons against the defendant, Lembaga Kumpulan Wang Simpanan Pekerja (KWSP) seeking the following orders:

(a) Keputusan Defendan untuk membayar amaun tambahan sebanyak RM2,000.00 sebagai faedah kematian kepada Harta Pusaka Goh Tin Poh, Si mati menurut tarikh permohonan untuk pengeluaran simpanan Si mati dibuat adalah tidak sah di sisi undang-undang;

(b) Defendan membayar amaun tambahan sebanyak RM30,000.00 sebagai faedah kematian kepada Harta Pusaka Goh Tin Poh, Si mati menurut tarikh kematian Si mati;

(c) Faedah dengan kadar 8% setahun atas RM28,000.00 setelah mengambilkira RM2,000.00 yang telah dibayar oleh Defendan mulai tarikh RM2,000.00 itu dibayar kepada Harta Pusaka, Si mati;

(d) Kos tindakan ini; dan

(e) Apa-apa relif lain Mahkamah yang Mulia ini berpendapat suaimanfaat.

[2] The facts of the case which are not disputed are as follows:

(i) Goh Tin Poh (deceased) was a member of the KWSP with membership number 11525027.

(ii) Goh Tin Poh (deceased) died on 12 October 1998.

(iii) Letters of administration to the estate of Goh Tin Poh (deceased) was granted to Ong Lian Chee (wife of the deceased), the plaintiff in this case on 6 March 2002 and issued on 14 August 2002.

(iv) The plaintiff applied for the withdrawal of all sums of money standing to the credit of Goh Tin Poh (deceased) with the KWSP under s. 54(1) of the Akta Kumpulan Wang Simpanan Pekerja 1991 (Act 452) in August 2001.

(v) Upon the withdrawal under s. 54(1) of the Act 452, an additional amount of RM2,000 was paid to the plaintiff pursuant to s. 58(1) of Act 452 read together with the Fifth Schedule to the same Act.

[3] The plaintiff, seeking for the prayers listed above, contends that the plaintiff is in fact entitled to RM30,000 as additional amount payable under s. 58(1) of Act 452 and not RM2,000.

[4] I would therefore first state the relevant provisions of Act 452 ie, s. 54(1), s. 58(1) and the Fifth Schedule. Sections 54(1) reads as follows:

PART IV

WITHDRAWAL OF CONTRIBUTIONS.

Withdrawal from the Fund

54. (1) The Board may authorize the withdrawal of all sums of money standing to the credit of a member of the Fund upon any terms and conditions as may be prescribed by the Board if the Board is satisfied that:

(a) the member of the Fund has died;

(b) ...
(c) ...
(d) ...
(e) ...

} (Not applicable)

Section 58(1) is as follows:

Payment of additional amount

58(1) Where authority for withdrawal under paragraph 54(1)(a) has been granted; an additional amount as set out in the Fifth Schedule shall be payable:

Provided that where the Board is satisfied that a member of the Fund has died, and no authority for withdrawal under paragraph 54(1)(a) has been granted, the Board may as it deems fit pay the additional amount to such person as the Board may approve.

(1A) ...
(2) ... } (Not applicable)

The Fifth Schedule referred to in s. 58(1) of Act 452 provides as follows:

FIFTH SCHEDULE

[Section 58(1)]

ADDITIONAL AMOUNT PAYABLE WHERE WITHDRAWAL IS MADE UNDER PARAGRAPH 54(1)(a)

The additional amount payable is two thousand five hundred ringgit.

[Sub. Act A1080; Am P.U. (A) 227/2003.]

[5] In respect of the Fifth Schedule to Act 452, the above is the current provision wherein the additional amount payable under s. 58(1) of Act 452 is RM2,500. Prior to the current provision, the amounts payable were:

(1) Prior to 1 July 2000 – RM30,000

(2) With effect from 1 July 2000 – RM2,000

[6] The question before this court is whether the additional amount payable under s. 58(1) of Act 452 to the plaintiff, the dependant of Goh Tin Poh (deceased) who died on 12 October 1998, ie, prior to the amendment that was effective on 1 July 2000 but the application to withdraw all sums of money standing to the credit of the deceased under s. 54(1) of Act 452 was made in August 2001, ie, after the amendment, is RM30,000 or RM2,000.

[7] The plaintiff argued that:

(i) the deceased died on 12 October 1998;

(ii) the letters of administration to the deceased estate was granted on 6 March 2002 and issued on 14 August 2002;

(iii) the withdrawal of all sums of money standing to the credit of the deceased in KWSP is based on s. 54(1) of the Act ie, death of member;

(iv) as the withdrawal is under s. 54(1) of Act 452, s. 58(1) of Act 452 comes into play, ie, an additional amount is payable;

(v) since the deceased died on 12 October 1998, the provision of the Fifth Schedule of Act 452 then should apply irrespective of the fact that the withdrawal was made in August 2001, the additional amount payable should be RM30,000 and not RM2,000; and

(vi) the determining factor is the date of death and not the date when the application to withdraw all sums of money standing to the credit of the deceased member's account was made.

[8] The defendant on the other hand argued that since the application to withdraw the credit standing to the member's account was made in August 2001, then the Fifth Schedule to Act 452 that was in force at the date/time of the withdrawal of all sums of money standing to the credit of the deceased member's account was made must apply even though the date of death was prior to the amendment that came into force on 1 July 2000. As such only RM2,000 and not RM30,000 should be paid as additional amount under s. 58(1) of Act 452.

[9] In short, what the defendant is saying is that the Fifth Schedule to Act 452 that was in operation at the date of withdrawal must apply. This means that the date when the withdrawal application was made is the criteria and not the date of death. The plaintiff on the other hand claims that the Fifth Schedule to Act 452 that was in operation on the date of death of the deceased member must apply.

[10] After hearing the submissions of both counsels, I allowed the plaintiff's claim with cost. The defendant is to pay the plaintiff a sum of RM30,000 pursuant to s. 58(1) of Act 452 taking into account the RM2,000 already paid to the plaintiff. The defendant now appeals against the said decision.

[11] Act 452 and the regulations made thereunder are silent on whether the quantum payable as additional amount is to be based on the law as it was at the time a member of the KWSP died or the law as it stands on the day the application for withdrawal of all the sums of money standing to the credit of the deceased member is approved.

[12] So the question is, what is the quantum payable. Is it the amount as stated in the Fifth Schedule of Act 452 as at the date of death of the deceased member or the Fifth Schedule of Act 452 as at the date the authority for withdrawal of the deceased member's contribution in the KWSP is made under s. 54(1) of the Act 452.

[13] The law is very clear that s. 58(1) of 452 only operates or is triggered when a withdrawal is made under s. 54(1) of Act 452 – "Where authority for withdrawal under para. 54(1)(a) has been granted, an additional amount as set out in the Fifth Schedule shall be payable:".

[14] Upon examining s. 54(1) and s. 58(1) of Act 452 it appears that the words are clear and unambiguous and therefore must be given their natural and ordinary meaning.

[15] The natural interpretation of the two sections above provides that:

(a) At the time that the approval for the withdrawal of all sums of money standing to the credit of a deceased member is given, the additional amount provided for in the Fifth Schedule to Act 452 shall be payable to the dependent of the deceased;

(b) The quantum is as stated in the Fifth Schedule to Act 452.

(c) At the time of the death of the deceased, the quantum provided for under the Fifth Schedule to Act 452 then, was RM30,000.

[16] It is very clear and certain that the right to withdraw under s. 54(1) of Act 452 accrued on the death of a member. Once such right accrued, s. 58(1) of the Act 452 comes into operation. As such the determining factor is the death and therefore the date of death is the pertinent point. Since at the date of death the Fifth Schedule to Act 452 provides for a sum of RM30,000 that amount must be paid to the plaintiff.

[17] The amended Fifth Schedule to Act 452 should not apply to the plaintiff as that would amount to giving the amendment a retrospective effect. This cannot be done as, firstly, there is no provision providing for a retrospective effect of the amendment reducing the additional amount from RM30,000 to RM2,000. Secondly, it is trite that an amendment to any statute dealing with rights making it less favourable should not "be construed retrospectively". In the case of *United Asian Bank Bhd v. The Negeri Sembilan Development Corporation* [1989] 1 MLJ 230 it was held that:

> (2) A retrospective operation is not to be given to a statement so as to impair an existing right or obligation or otherwise than as regards matters of procedure, unless language is very clear and capable of only one meaning in that it is retrospective. **It is most unfair to resort to retrospective Enactments just to avoid a party's legal obligations.**
>
> (3) In the present case, nowhere is there clear provision in the Amendment Act making it retrospective the taking away of an existing right or abolishing an existing obligation.

In the case of *Bank of Canton Ltd v. Dart Sum Timber (Pte) Ltd* [1981] 2 MLJ 58 (also [1980 – 1981] SLR 392) DC D' Cotta J said:

> It is necessary in construing the section to give effect to two fundamental principles of statutory interpretation, namely:
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> (i) that no statute shall be construed to have a retrospective operation unless such a construction. Page 60 appears very clearly in the terms of the Act, or arises by necessary and distinct implication – *Maxwell on Interpretation of Statutes* 12th Ed p 215; and.

OCJ Raja Azlan Shah J (as he then was) in *Pesurohjaya Ibu Kota Kuala Lumpur v. Public Trustee & Ors* [1971] 2 MLJ 30 said:

> The general rule is that there is a presumption against giving statutes a retrospective operation. The presumption is that the legislature does not intend what is unjust. The learned author of *Craies' on Statute Law* (6 ed) at p 386, defines a retrospective statute as one.
>
> > which takes away or impairs any vested right acquired under existing laws or creates a new obligation, or imposes a new duty; or attaches a new disability, in respect to transactions or considerations already pass.
>
> The rule is however, a mere presumption and as such it may be rebutted by express words in the Act or by circumstances sufficiently strong to replace.

[18] The three cases above which were cited by the plaintiff's counsel are all High Court decisions and are only persuasive. However, in the Federal Court of *Lee Chow Meng v. Public Prosecutor* [1978] 2 MLJ, Suffian LP said:

> A statute dealing with procedure has retrospective effect, that is, it applies to proceedings begun before and after the commencement of the statute, unless a contrary intention is expressed or clearly implied. This was so stated by Lord Blackburn in *Gardner v. Lucas.*
>
> > ... it is perfectly settled that if the legislature forms a new procedure, that, instead of proceeding in this form, you should proceed in another and a different way, clearly there bygone transactions are to be sued for and enforced according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be.
>
> *On the other hand a statute dealing with rights has effect only for the future and is not to be construed retrospectively,* it does not apply to proceedings begun before its commencement, it only affects proceedings begun after that, unless there is a clear indication to the contrary. This was so stated by Jessel M.R. in *Re Joseph Suche & Co. Ltd.* in the following words:
>
> > *It is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, to not affect them.* (emphasis added).

[19] As such, since there is no provision to give retrospective effect to the amended Fifth Schedule to Act 452 that came into force on 1 July 2000, rights that have accrued should not be effected.

[20] An illustration below will also help to explain why the defendant's argument has no merits at all and cannot be accepted. If allowed it would result in absurdity. Assuming, another member dies prior to 1 July 2000 but the family applies for withdrawal speedily ie, before 1 July 2000, the additional amount payable would be RM30,000. On the other hand, as in the present case, just because the withdrawal was made after 1 July 2000, the quantum of the additional amount was paid under the amended Fifth Schedule that came into force on 1 July 2000 and therefore the deceased member's estate was entitled to only RM2,000. This clearly shows that the interpretation adopted by the defendant will cause injustice and inequality before the law and surely this could not have been the intention of the legislature. In *Mohamad Khalid bin Farzalur Rahaman & Anor v. Citibank Bhd & Anor* [2000] 2 CLJ 797 it was held:

> (1) In interpreting statutes, a court will not follow a construction of a statute that would cause great hardship to the general public where another interpretation is available. In a situation where great inconvenience or injustice will follow as a result of requiring strict compliance with a statute, the courts will be disinclined to hold that the provision imposed an obligation even though it may be couched in mandatory terms. The words in a statute ought to be construed in a sense in which they best harmonize with the subject of the statute and in which the object of the statute was to be obtained.

[21] It is apparent that the amendment to the Fifth Schedule of Act 452 that came into force on 1 July 2000 would reduce the liability of the KWSP. This must be the intention of the amendment as evidenced by the speech in Parliament when the Amendment Bill for Act 452 was tabled. The relevant part of the speech is reproduced below:

> Bagi mengelakkan ahli-ahli lain dibebankan dengan subsidi sedia ada, adalah dicadangkan kuantum *bayaran bantuan kematian* dan hilang keupayaan ditetapkan sebanyak RM2,000.00 untuk setiap permohonan pengeluaran kematian atau hilang keupayaan daripada Lembaga kepada ahli, ini melibatkan pindaan kepada seksyen 58. (emphasis added).

Be that as it may, such amendment should not be made to the detriment of those parties whose rights had accrued prior to the amendment.

[22] For the reasons given above, I allowed the plaintiff's claim with cost.